No. 807

Office - Supreme Court, U. S.
FILED
DEC 22 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

~~315 U.S. 801~~

315 U.S. #19

SOL FEINBERG,
Petitioner,

vs.

FEI-GLA

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

EVERETT JENNINGS,
Chicago, Ill.,
Counsel for Petitioner.

GEORGE D. SULLIVAN,
PAUL CRAIG,
Of Counsel.

PRINTED BY CHICAGO LAW PRINTING CO.

INDEX.

	PAGE
Petition for writ of certiorari	1
A. Summary statement of the matter involved	1
B. Reasons relied upon for the issuance of the writ	3
Prayer for writ	5
Brief in support of petition	7
Opinion of the court below	7
Jurisdiction	7
Statement of the case	7
Specification of errors	11
Argument:	13
Jurisdiction	13
The Circuit Court of Appeals erred in approving the said instruction given by the trial court herein	14
The Circuit Court of Appeals erred in not holding that it was erroneous for the trial court to permit the introduction in evidence of minor conspiracies and criminal acts with which petitioner was not identified or in any manner connected	15
The evidence does not support the verdict	18
The verdict is opposed to the law and the evidence	18
The Circuit Court of Appeals (Tr. 204) erred in not reversing the case because the trial court denied the motion of petitioner, at the close of all the evidence on the trial, for a directed verdict of not guilty	19
Conclusion	20

(33596

PAGE

Table of Cases Cited.

Cameron v. U. S., 231 U. S. 710, 716 13

Edgington v. U. S., 164 U. S. 361, 366; 41 L. Ed. 467, 471 ..... 4, 13

Maguum Import Co. v. DeSpoturno, 262 U. S. 159, 163; 67 L. Ed. 922, 924 13

Marcante v. U. S., 49 F. (2d) 156, 157 ..... 4, 16

Miller v. U. S., 120 F. (2d) 968, 972 ..... 3, 4, 13

Salinger v. U. S., 23 F. (2d) 48, 52 ..... 3, 13, 14

Sunderland v. U. S., 19 F. (2d) 202, 215 14

Terry v. U. S., 7 F. (2d) 28, 30 ..... 4, 16

U. S. v. Beck, 118 F. (2d) 178, 182 ..... 4, 16

U. S. v. Wills, 36 F. (2d) 855, 857 ..... 4, 16

Wyatt v. U. S., 23 F. (2d) 791, 792 ..... 4, 16, 17

Judicial Code.

Sec. 240 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No.

SOL FEINBERG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Sol Feinberg respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

Petitioner Sol Feinberg on May 2, 1941, was indicted with the following persons, viz.: Emma Ludwig, Stanley Hoy, Manuel Menendaz, Mamie Doe, Chester Doe, James

---

Throughout this Petition, inadvertently, we have referred to the record with the abbreviation (Tr.). This error was not discovered until the Petition was set in type. We respectfully ask the court's indulgence.

T. Lewis, Lucille Williams, Austin Edge, Henry Driscoll, Harry Decker, James Tillman, Eddie Doe, Art Schultz, John Bridges and Foster Mosley.

The indictment contains thirty-two counts. The first fifteen counts (Tr. 2-15) charge the unlawful sale of narcotics in violation of Internal Revenue Code No. 53 (Secs. 2553-A, 2554-A). Counts sixteen to thirty-one (Tr. 15-29) inclusive, charge fraudulently receiving, concealing, buying and facilitating the transportation of narcotics after unlawful importation thereof in violation of the Narcotic Drugs Import and Export Act, 21 U.S.C.A. 174. Count thirty-two (Tr. 29-33) charges a conspiracy to violate the said Narcotic Drugs Import and Export Act, 18 U.S.C.A. 88.

All the counts, except count seventeen (Tr. 16-17) and count thirty-two (Tr. 29-33) were withdrawn from the jury in the case against the said Sol Feinberg.

The jury found him guilty of a violation of the said two counts. The court sentenced him to the penitentiary for a period of two years and to pay a fine in the sum of two hundred fifty dollars ($250.00).

The case was appealed to the United States Circuit Court of Appeals for the Seventh Circuit, where the judgment of the District Court was affirmed.

Count thirty-two, the conspiracy count (Tr. 29-30) after the usual introductory allegations in which the defendants are named and the division and district stated, charges that:

> "On and between, to wit, May 15, 1939, and April 11, 1941, at Chicago, aforesaid, in the division and district aforesaid, then and there knowingly, unlawfully, wilfully and feloniously did conspire, combine, confederate, and agree together, and with divers other persons, whose names are to the said grand jurors unknown, to commit divers offenses, against the United

States, that is to say, the offense of unlawfully receiving, concealing, buying, selling and facilitating the transportation and concealment of large quantities of certain derivatives of opium, to wit, morphine and codeine mixture and heroin hydrochloride, the exact amounts of which are to the said grand jurors unknown, after being imported into the United States contrary to law, knowing the same to have been imported contrary to law; all such receiving, concealing, buying, selling and facilitating the transportation and concealment of said morphine and codeine mixture and heroin hydrochloride being in violation of the Act of Congress approved May 26, 1922, and known as the Narcotic Drugs Import and Export Act."

Count seventeen (Tr. 16-17) charged that the defendants, on March 11, 1941, did knowingly and fraudulently receive, conceal, buy and facilitate the transportation and concealment after importation of a large quantity of a certain derivative of opium, to wit, 395 grains of heroin hydrochloride, knowing the same to be unlawfully imported into the United States.

B.

Reasons Relied Upon for the Issuance of the Writ.

Petitioner respectfully suggests the following reasons:

The ruling of the Circuit Court of Appeals for the Seventh Circuit in its approval of the instruction just quoted in the instant case (Tr. 189), on the weight to be accorded by the jury to character testimony in favor of a defendant, conflicts with the holding upon that subject of the Circuit Court of Appeals for the Eighth Circuit.

Miller v. *U. S.*, 120 F. (2d) 968, 972.
Salinger v. *U. S.*, 23 F. (2d) 48, 52.

The said instruction is erroneous.

1. Because it was too narrow and did not explain to the jury the purpose and function of such evidence, and was in conflict with the applicable decisions of this court.

   Edgington v. *U. S.*, 164 U. S. 361, 366; 41 L. Ed. 467, 471.
   Miller v. *U. S.*, 120 F. (2d) 968, 972.

2. Because it omitted any reference to the evidence of petitioner's good reputation for truth and veracity, and instructed the jury only regarding the evidence of his good reputation for being a peaceful law abiding citizen.

The Circuit Court of Appeals should have reversed the case because the trial court did not at the end of all the evidence in the case grant said Feinberg's motion that the indictment be dismissed and for a directed verdict of not guilty as to said Feinberg.

The trial court erred in admitting in evidence proof of different and disconnected minor conspiracies and criminal acts with which petitioner was not identified or in any manner connected, as is shown by the testimony of Austin Edge (Tr. 95), Eddy Jackson (Tr. 104), Earl Nettles (Tr. 107), James Tillman (Tr. 110), Margaret Stein (Tr. 112), Ruford Kelley (Tr. 113), Helen West (Tr. 116), Sarah Walker (Tr. 118), Glen Howard (Tr. 121), Mabel Jones (Tr. 124), Allyn B. Crisler (Tr. 126), Joseph V. Walsh (Tr. 129), and Dorothy Sullivan (Tr. 37).

Marcante v. *U. S.*, 49 F. (2d) 156, 157.
Wyatt v. *U. S.*, 23 F. (2d) 791, 792.
U. S. v. *Wills*, 36 F. (2d) 855, 857.
Terry v. *U. S.*, 7 F. (2d) 28, 30.
U. S. v. *Beck*, 118 F. (2d) 178, 182.

That a variance between the indictment and the proof resulted from the introduction of evidence of said disconnected matters.

The Evidence Does Not Support the Verdict.

The Verdict Is Opposed to the Law and the Evidence.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, directing that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entered on its docket, and that the said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

SOL FEINBERG,
Petitioner.

EVERETT JENNINGS
Counsel for Petitioner.

GEORGE D. SULLIVAN,
PAUL CRAIG,
Of Counsel.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

Everett Jennings, being first duly sworn, says that he is counsel for Sol Feinberg, the petitioner; that he participated in the preparation of the foregoing petition, and that the allegations thereof are true as he verily believes.

EVERETT JENNINGS

Subscribed and sworn to before me this 19th day of December, A.D., 1941.

IRMA FISHER,
Notary Public.

(Seal)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit in this cause is set out in the Transcript of the Record filed herein at pages 234 to 237.

II.

Jurisdiction.

1. A final judgment has been rendered by the United States Circuit Court of Appeals for the Seventh Circuit, and this Court has jurisdiction to review this judgment under Sec. 240 of the Judicial Code as amended and under its power to secure uniformity among the Circuit Courts of Appeals for the ten circuits.

2. The date upon which this judgment became final was November 26, 1941.

3. We believe the jurisdiction is sustained by the cases cited in support of our reasons for granting the writ.

STATEMENT OF THE CASE.

The evidence for the government was largely that of one witness, Dorothy Sullivan, an informer, a drug addict, and an ex-convict. A number of colored people, from whom she made purchases of drugs without the knowledge of petitioner, also testified.

In support of the said two counts upon which petitioner was convicted, the chief government witness testified (Tr. 41) that she made a purchase of narcotics from petitioner on March 11, 1941, and another purchase (Tr. 44) on March 17, 1941.

In addition to these alleged transactions the government introduced evidence of sales of narcotics by various persons to the said Dorothy Sullivan and to others. These sales occurred as follows:

March 8, 1941 (Tr. 38), by Stanley Moy to Dorothy Sullivan and Emma Ludwig, a defendant;

March 17, 1941 (Tr. 46), by Austin Edge to Dorothy Sullivan;

March 22, 1941 (Tr. 54), by Henry Driscoll to Dorothy Sullivan;

March 22, 1941 (Tr. 56), by Harry Decker to Dorothy Sullivan;

March 26, 1941 (Tr. 57), by Austin Edge to Dorothy Sullivan;

March 27, 1941 (Tr. 59), by Lucille Williams to Dorothy Sullivan;

April 2, 1941 (Tr. 61), by Foster Mosley to Dorothy Sullivan;

April 2, 1941 (Tr. 62, 63), by Booker, whose real name is John Bridges, to Dorothy Sullivan;

April 3, 1941 (Tr. 65), three sales by Lucille Williams to Cheatam, Bubbles and Hudson;

April 9, 1941 (Tr. 66), by James Tillman to Dorothy Sullivan, and at the same time and place a sale by James Tillman to Lucille Williams.

Austin Edge (Tr. 96, 97) testified to two sales to defendant Emma Ludwig, and three sales (Tr. 100) to Dorothy Sulivan.

Eddie Jackson (Tr. 105) testified to the purchase from Foster Mosley of narcotics.

Earl Nettles (Tr. 109, 110) testified to purchases of narcotics from Foster Mosley and James Tillman.

James Tillman (Tr. 111) testified that he purchased narcotics from Foster Mosley and that he never sold Dorothy Sullivan anything and did not know her.

Ruford Kelley (Tr. 114) testified that he purchased narcotics from Austin Edge and Lucille Williams.

Glen Howard (Tr. 121) testified that he purchased narcotics from Foster Mosley.

Mabel Jones (Tr. 124, 126) testified she accompanied the witness Glen Howard to 2222 Dearborn street, Chicago, and received narcotics from him to give to Earl Nettles.

The petitioner on the trial (Tr. 175) denied that he knew government's witness Dorothy Sullivan; denied that he sold to her any narcotics or ever saw any narcotics, or knew what they were; denied (Tr. 176) that he ever had or concealed or transported narcotics or that he ever conspired to do so. He also denied (Tr. 175) that Emma Ludwig ever called him on the telephone; denied (Tr. 174) that Dorothy Sullivan was in his place of business at any time.

Emma Ludwig, a defendant (Tr. 150) denied that on March 11, 1941, as testified by Dorothy Sullivan, or at any other time, she called petitioner on the telephone, or had any conversation with him about narcotics; denied that she ever called on the telephone and asked for Sol.

Manuel Menendaz, a defendant (Tr. 144) denied that he, as testified by Dorothy Sullivan, asked petitioner about any dope or narcotics; denied (Tr. 143) that he was in petitioner's tavern with Dorothy Sullivan on March 22, 1941, but testified that he was in Gary, Indiana, all that evening; denied (Tr. 143) that he was in petitioner's place of business with Dorothy Sullivan on the 17th or 22d of March, 1941.

Herta Simlak (Tr. 172) testified that she was in petitioner's place of business of the 11th and on the 17th of March, 1941, and that Dorothy Sullivan was not there on either of said dates.

Saline Bailey (Tr. 166) testified that she was employed by petitioner in his place of business for two years and she was there during March and April 1941, and that she did not see Dorothy Sullivan there on the 11th, 17th or 22d of March, 1941, or at any other time.

Joseph Mogley (Tr. 164) testified that he worked tending bar at petitioner's place of business on March 17, 1941, and March 22, 1941, and that he did not see Dorothy Sullivan in the place on either of said dates, or at any other time.

Rev. John Robinson Pickells (Tr. 163), Rector of Trinity Episcopal Church, across the street from petitioner's place of business; Andrew J. Tilley (Tr. 170), President of Munger's Laundry, situated in the same neighborhood; Raymond Allison (Tr. 171), President of Domestic Linen & Towel Supply Co., a laundry; Ralph Lee Goodman (Tr. 169), Chairman of the Business Research Committee of the Chicago Association of Commerce, the Chicago Crime Commission and other organizations; John Lass, connected with the Sunshine Laundry Company for twenty-five years, and Fred Lenz, an employee of Munger's Laundry, all testified that the general reputation of petitioner in the

neighborhood in which he lived among his friends and associates for truth and veracity and for being a law abiding citizen was good.

At the conclusion of all the evidence in the case (Tr. 205) petitioner moved the Court that the indictment against him and each count thereof be dismissed as to him, and for a directed verdict of not guilty upon each count. This motion was denied and petitioner excepted.

The court thereupon gave to the jury the instructions set out in the transcript of the record (Tr. 181-191).

Among the instructions so given was (Tr. 189) the following instruction:

> "The defendant Sol Feinberg has put in evidence his general reputation for being a peaceful, law abiding citizen. Such evidence is permissible under the law and is to be considered by the jury as a circumstance in this case along with all other facts and circumstances in evidence."

Specification of Errors.

Comes now the petitioner Sol Feinberg, by his counsel, and says that in the record and proceedings in the United States Circuit Court of Appeals for the Seventh Circuit there are manifest errors.

1. The United States Circuit Court of Appeals erred in not holding that it was error for the trial court to permit the introduction in evidence of different and disconnected minor conspiracies and criminal acts under Count 32 and Count 17 with which petitioner was not identified or in any manner connected.

2. The United States Circuit Court of Appeals erred in not holding that it was error for the trial court to give

to the jury the instruction upon the weight to be accorded to character testimony.

3. The trial court erred in not instructing the jury as to the weight to be accorded to the evidence of petitioner's good reputation for truth and veracity.

4. The United States Circuit Court of Appeals erred in not holding that it was error for the trial court to hold there was no variance between the indictment and the evidence.

5. The Circuit Court of Appeals erred in not holding that the evidence does not support the verdict.

6. The Circuit Court of Appeals erred in not holding that the verdict is opposed to the law and the evidence.

7. The Circuit Court of Appeals erred in not holding that it was error for the trial court to refuse to grant the motion of said Feinberg at the end of all the evidence in the case to find the said Feinberg not guilty.

Respectfully submitted,

EVERETT JENNINGS,
Counsel for Petitioner.

GEORGE D. SULLIVAN,
PAUL CRAIG,
Of Counsel.

ARGUMENT.

Jurisdiction.

This Court has power to review this case under Section 240 of the Judicial Code as amended, and under its authority to secure uniformity of decision among the Courts of Appeals in the ten Circuits.

Sec. 240, Judicial Code.

Maguum Import Co. v. *De Spoturno,* 262 U. S. 159, 163; 67 L. Ed. 922, 924;

Cameron v. *U. S.,* 231 U. S. 710, 716.

Character testimony having been introduced by petitioner, the Court gave to the jury (Tr. 189) the following instruction:

> "The defendant Sol Feinberg has put in evidence his general reputation for being a peaceful, law abiding citizen, such evidence is permissible under the law, and is to be considered by the jury as a circumstance in this case along with all other facts and circumstances in evidence."

The decision of the Circuit Court of Appeals of the Seventh Circuit upholding the said instruction conflicts with the decisions of the Circuit Court of Appeals of the Eighth Circuit, holding that the giving of a similar instruction was error.

Salinger v. *U. S.,* 23 Fed. (2d) 48, 52.

Miller v. *U. S.,* 120 Fed. (2d) 968, 972.

The decision herein in our view conflicts with the applicable decisions of this court.

Edgington v. *U. S.,* 164 U. S. 361, 366; 41 L. Ed. 467, 471.

The Circuit Court of Appeals erred in approving the said instruction given by the trial court herein.

The Circuit Court of Appeals of the Eighth Circuit in *Salinger* v. *U. S.*, 23 F. (2d) 48, 52, held that the defendant was entitled to an instruction to the effect: (1) that the purpose and function of such evidence is to raise a reasonable doubt; (2) that it is entitled to be considered whether the effect of the other evidence in the case is clear or doubtful; and (3) that when it is considered with the other evidence, if a reasonable doubt is created as to the defendant's guilt he is entitled to be acquitted.

In *Sunderland* v. *U. S.*, 19 F. (2d) 202, 215, the Circuit Court of Appeals of the Eighth Circuit say:

> "That where evidence of good character is introduced in behalf of the defendant, he is entitled, and especially if request is made, to an instruction setting forth (1) the purpose and function of such evidence, viz. to generate a reasonable doubt; and setting forth (2) the probative status of such evidence, viz. that it is entitled to be considered whether the other evidence in the case be clear or doubtful; and setting forth (3) the possible effect of such evidence, viz. that when it is considered with the other evidence, if a reasonable doubt is created as to defendant's guilt, he is entitled to an acquittal. We are constrained to hold that the charge given in the instant case did not properly fulfill any one of these requirements."

Under these cases the instruction in the instant case was erroneous.

The instruction was bad for the further reason that it ignored (Tr. 163) the testimony of Feinberg's good character for truth and veracity. As petitioner testified (Tr. 174) in the case his good reputation for being truthful

was material and important, and the jury should have been instructed upon that portion of the evidence.

Character evidence in his favor should have been of the greatest value to the defendant Feinberg. A full correct instruction on that subject was most important. The charge against him was supported practically solely by the testimony of an informer, and ex-convict, a drug addict, and one whose character was marked by every scar that can be made by a dishonorable blade.

The Circuit Court of Appeals erred in not holding that it was erroneous for the trial court to permit the introduction in evidence of minor conspiracies and criminal acts with which petitioner was not identified or in any manner connected.

The conspiracy count (Tr. 29, 30), after the usual introductory allegations in which the defendants are named and the division and district stated, charges that:

> "On and between, to wit, May 15, 1939, and April 11, 1941, at Chicago, aforesaid, in the division and district aforesaid, then and there knowingly, unlawfully, wilfully and feloniously did conspire, combine, confederate and agree together, and with divers other persons, whose names are to the said grand jurors unknown, to commit divers offenses, against the United States, that is to say, the offense of unlawfully receiving, concealing, buying, selling and facilitating the transportation and concealment of large quantities of certain derivatives of opium, to wit, morphine and codeine mixture and heroin hydrochloride, the exact amounts of which are to the said grand jurors unknown, after being imported contrary to law; all such receiving, concealing, buying, selling and facilitating the transportation and concealment of said morphine

and codeine mixture and heroin hydrochloride being in violation of the Act of Congress approved May 26, 1922, and known as the Narcotic Drugs Import and Export Act."

The conspiracy charged is a general one. Proof of different and disconnected smaller conspiracies will not sustain a conviction.

Marcante v. *U. S.*, 49 F. (2d) 156, 157.

Wyatt v. *U. S.*, 23 F. (2d) 791, 792.

U. S. v. *Wills*, 36 F. (2d) 855, 857.

Terry v. *U. S.*, 7 F. (2d) 28, 30.

U. S. v. *Beck*, 118 F. (2d) 178, 182.

In the *Marcante* case, 49 F. (2d) at pages 156, 157, the court say:

"He must, however, know the purpose of the conspiracy and agree to become a party to a plan to effectuate that purpose. A conspiracy is bottomed on an agreement to accomplish an illegal act and without such agreement there can be no conspiracy; a conspiracy 'is a partnership in criminal purpose.' *United States* v. *Kissel*, 218 U. S. 601, 31 S. Ct. 124, 126; 54 L. Ed. 1168; *Brown* v. *Elliott*, 225 U. S. 392, 32 S. Ct. 812, 56 L. Ed. 1136; *McDonnell* v. *United States* (C. C. A. 1) 19 F. (2d) 801; *Allen* v. *United States* (C. C. A. 7) 4 F. (2d) 688; *Rudner* v. *United States* (C. C. A. 6) 281 F. 516.

"On the other hand, there may be two or more conspiracies in the same state to violate the same law. If such be the case the government may not convict all the members of all the conspiracies under a charge of membership in one large conspiracy."

In *Wyatt* v. *U. S.*, 23 F. (2d) 791, 792, the court used this language:

> "When, as here, one large conspiracy is specifically charged, proof of different and disconnected smaller ones will not sustain convictions; nor will proof of crime committed by one or more of the defendants, wholly apart from and without relation to others conspiring to do the thing forbidden, sustain conviction. *Terry* v. *United States* (C. C. A.) 7 F. (2d) 28, 30; *United States* v. *McConnell* (D. C.) 285 F. 164, 166."

The purchase (Tr. 38, 39) by Vic Shaw and Dorothy Sullivan from Stanley Moy of an ounce of heroin, March 8, 1941; the purchase (Tr. 46) by Dorothy Sullivan from Austin Edge on March 17, 1941, of narcotics; the purchase (Tr. 47) by Dorothy Sullivan from Austin Edge and Lucille Williams on March 20, 1941, of narcotics; the purchase (Tr. 48, 49) by Dorothy Sullivan from Austin Edge on March 20, 1941, and on March 21, 1941 (Tr. 50) of narcotics; the purchase (Tr. 56) by Dorothy Sullivan from Harry Decker on March 22, 1941, of heroin; the purchase (Tr. 56, 57) by Dorothy Sullivan from Austin Edge or Henry Driscoll on March 26, 1941; the purchase (Tr. 58, 59) by Dorothy Sullivan from Lucille Williams on March 27, 1941; the purchase (Tr. 60, 61) by Dorothy Sullivan from Foster Mosley on April 2, 1941; the purchase (Tr. 62, 63) by Dorothy Sullivan from Harry Decker or one Booker on April 2, 1941; the purchase (Tr. 64, 65) by Lou Cheatam from Lucille Williams on April 3, 1941; the purchase (Tr. 65, 66) by Dorothy Sullivan from James Tillman (Wingey) on April 8, 1941; the purchase (Tr. 67) by Dorothy Sullivan and Rupert Kelly from Austin Edge on April 9, 1941, were all made and done without the knowledge, acquiescence or consent of petitioner.

This evidence was incompetent in support of count 17 or count 32, and was highly prejudicial to petitioner on both of said counts.

The evidence does not support the verdict.

The verdict is opposed to the law and the evidence.

The case against petitioner as made by relevant and material evidence stands upon the testimony of Dorothy Sullivan. She was an informer (Tr. 73, 135), a former inmate of three penitentiaries (Tr. 71, 72, 88) on conviction for larceny, and a narcotic addict (Tr. 44, 54, 73, 74, 77, 80, 81, 82, 84, 93). She was so untrustworthy that Narcotic Agent Walsh watched her closely whenever he advanced money to her to be used in the purchase of narcotics (Tr. 79). She was not trusted by the government out of sight of the narcotic agent. The government relied upon her unreliable testimony when she was placed upon the witness stand, and what is even stranger the jury found petitioner guilty.

Petitioner (Tr. 174) quit school when he was fourteen years of age and worked at Lew's jewelry store for two years; he then bought a truck and engaged in the vegetable business. After three years in that business he sold it and bought a grocery store. This store he conducted until about five years ago, when he bought his present tavern and restaurant, and later added another store for the conduct of the package liquor business. The grocery store and the tavern were in the same community. All of this was transacted in Chicago.

Petitioner denied all the charges (Tr. 175, 176). He was corroborated by Emma Ludwig (Tr. 150, 151, 152), by Manuel Menendaz (Tr. 142, 143, 144), by Joseph Mogley (Tr. 164, 165), by Herta Simlack (Tr. 172), and by Saline Bailey (Tr. 167, 168).

A half dozen prominent men testified that his general reputation for truth and veracity and for being a law abiding citizen was good.

Chief among these was Rev. John Robinson Pickells (Tr. 163), who was Rector of Trinity Episcopal Church. Others were Ralph Lee Goodman (Tr. 169), chairman of the Business Research Committee of the Chicago Association of Commerce and member of the Chicago Crime Commission; Andred J. Tilley (Tr. 170), president of Munger's Laundry; Raymond Allison (Tr. 171), president of Domestic Linen and Towel Supply Co., a laundry, and others.

The evidence in our view of the case not only did not prove the guilt of petitioner, but was of such strength in his favor as to establish beyond a reasonable doubt that he was not guilty under either count seventeen or count thirty-two.

The independent conspiracies and disconnected criminal acts introduced against petitioner upon the trial on both count thirty-two and count seventeen were erroneously admitted in evidence and resulted in the verdict being against the law as well as against the evidence.

The Circuit Court of Appeals (Tr. 204) erred in not reversing the case because the trial court denied the motion of petitioner, at the close of all the evidence on the trial, for a directed verdict of not guilty.

The motion should have been allowed by the trial court because, as heretofore argued, there was not sufficient competent evidence to make a case against petitioner and because there was a variance between the indictment and the proof due to the erroneous introduction of independent separate and disconnected conspiracies and other criminal acts.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that justice may be done, and to that end a writ of certiorari should be granted by this Court and the decision of the United States Circuit Court of Appeals for the Seventh Circuit should be reviewed and reversed by this Court.

Respectfully submitted,

EVERETT JENNINGS,
Counsel for Petitioner.

GEORGE D. SULLIVAN,
PAUL CRAIG,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 807

SOL FEINBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 234–236) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 26, 1941 (R. 237). The petition for a writ of certiorari was filed December 22, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether, in a prosecution for conspiracy to violate the narcotic laws, the trial court erred in admitting evidence as to transactions in which petitioner did not actually participate.

2. Whether the trial court committed reversible error in its instruction concerning character evidence, to which instruction petitioner made no objection and suggested no amplification.

STATEMENT

Petitioner was convicted (R. 207) in the District Court of the United States for the Northern District of Illinois on counts 17 (R. 16–17) and 32 (R. 29–33) of a 32-count indictment (R. 2–33).[1] Count 17 charged a violation of the Narcotic Drugs Import and Export Act (21 U. S. C. 174).[2] Count

[1] Petitioner was indicted along with 15 other defendants, Emma Ludwig, Stanley Moy, Manual Menendaz, Mamie Doe, Chester Doe, James T. Lewis, Lucille Williams, Austin Edge, Henry Driscoll, Harry Decker, James Tillman, Eddie Doe, Art Schultz, John Bridges, and Foster Mosley (R. 2–15). As to all defendants, counts 1 to 15, inclusive, count 21, and counts 27 to 31, inclusive, were withdrawn from the jury at the end of the evidence (R. 182). As to the petitioner, the court permitted the case to go to the jury only as to counts 17 and 32 (R. 182, 152–153).

[2] This section provides: "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction,

32 charged a conspiracy to violate the Act (18 U. S. C. 88). Petitioner was sentenced generally to imprisonment for two years and to pay a fine of $250 (R. 209).

The Government's case may be summarized as follows:

On March 8, 1941, Dorothy Sullivan, a former narcotic addict (R. 73), told Manuel Menendaz (Mendez), whom she had known for several months, that she was "looking around for a connection" (R. 38). Menendaz took her to the home of Vic Shaw (Emma Ludwig), an addict and peddler, and there introduced her and vouched for her (R. 75–76). Dorothy said she wanted to buy an ounce of heroin (R. 75) and Vic made a telephone call (R. 76). Dorothy heard her ask for petitioner, who was known as "Sol," and then for "Stanley," and then say that "she wanted an ounce of the same thing that she had been getting, heroin" (R. 38–39, 75–76). An ounce of drugs was brought to Vic's house by Stanley Moy, and Vic paid him $60 for it, $35 thereof having been contributed by Dorothy. The girls divided "the stuff," Vic adulterating her share for resale

---

be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

(R. 39, 77). Dorothy later turned her share over to Federal Narcotics Agent Walsh (R. 40).[3]

On March 11, 1941, Dorothy went to Vic's and told Vic she wanted to buy some more narcotics (R. 78). Vic again called petitioner and told him she was sending Dorothy to him and that "she was all right, that he should deal with" her (R. 41, 78–79). Dorothy then went to petitioner's tavern, identified herself as the girl Vic had just called about, and gave petitioner $65 for an ounce of heroin. Petitioner told her it would be delivered to Vic's within thirty minutes, and Dorothy returned to Vic's. The heroin did not arrive promptly, and Vic called petitioner who told her "the delay was caused because the boys were trying to shake a tail; they thought they were being followed by government agents or the police and were trying to duck them." Menendaz came in, told Dorothy that petitioner was charging her too much, and went to see him. He returned and said petitioner told him that since Dorothy wanted the stuff she "would pay the price" (R. 42–43). Later, Art (Art Schultz) and another arrived with the heroin for Dorothy (R. 80). Early the next morning Art called Dorothy by telephone to see how she liked "the stuff." She told him it was very poor, but he said he "couldn't do anything

[3] Except where otherwise indicated herein, she turned the drugs over to Walsh shortly after making each purchase (R. 43–44, 46, 50, 52, 54, 56, 59, 61, 63, 67, 68).

about it" because she had already paid petitioner and she would have to see him about it (R. 43, 80).

On March 16, 1941, Vic informed Dorothy that petitioner "had some new stuff" he wanted Dorothy to try. On March 17, Dorothy went to petitioner's tavern and paid him $65 for an ounce of heroin and one Eddie delivered it to her at Vic's place. Dorothy and Vic tried it hypodermically and found it was of poor quality. Vic then called petitioner and he told her to have Dorothy return it and he would make it good (R. 44, 81). Dorothy returned it to the petitioner, keeping out a few grains which she turned over to Agent Walsh, but petitioner never replaced it, nor would he return her money (R. 44–45, 82).

Telling Vic she was dissatisfied with the price of the heroin she was getting, Dorothy then asked her to call "another connection" (R. 45). In response to Vic's telephone call, Austin Edge came to Vic's house and sold Dorothy an $8 deck (one-eighth of an ounce) of heroin that he was carrying in his hat band (R. 45–46). On March 19, Vic again telephoned to Edge for Dorothy. Edge came to the house with Lucille Williams and Lucille handed Dorothy one-eighth of an ounce of heroin for which she paid Lucille $8 (R. 47, 83). On March 20, 1941, while on her way to Vic's house, Dorothy met Edge on the street, told him she would rather deal directly with him than through Vic, and he told her that he and Lucille could always be

reached at room 414 at the Prairie Hotel (R. 48–49). Dorothy went on to Vic's, having previously told Vic she was coming to get some drugs. After she arrived, Vic called Edge and he delivered one-eighth of an ounce of heroin for which Dorothy paid him $8 (R. 49–50). On March 21, 1941, Dorothy went to room 414 at the Prairie Hotel and there found Edge, Lucille, Helen Kelly and one "Bubbles." Dorothy told Edge she wanted "to make a buy" and he left the room, returning shortly with a package of heroin for which she paid him $8 (R. 51). On March 22, Dorothy went again to Edge's room at the hotel, and paid him $5 for an introduction "to his connection" (R. 52–53). Edge then went out and returned with Henry Driscoll, who sold Dorothy an ounce of heroin for $55 (R. 53–54).

On March 22, 1941, Menendaz introduced Dorothy to Harry Decker "who was pushing stuff, meaning narcotics," and she purchased from Decker a $3 deck of heroin (R. 55–56).

On March 26, 1941, Dorothy purchased a $6 deck from Edge at his hotel room. Two colored women came in while she was there, purchased a $3 deck, prepared it, and took it. Lucille Williams and Helen Kelly also took doses (R. 57–58). Again, on March 27, Dorothy purchased an $8 deck from Lucille at Edge's room (R. 59).

On April 2 Dorothy went to Edge's room and there met Lucille and Mose (Foster Mosley). Lu-

cille was going to the hospital to see Edge, who was sick at the time, and Mose sold Dorothy $16 worth of heroin (R. 60–61). Dorothy left the hotel and met Harry Decker. He had nothing to sell her, so he made a telephone call, and in about fifteen minutes one Booker (John Bridges) arrived and sold her a $3 deck of drugs to try. Booker said he knew she was one of Edge's "good customers" and did not like to take a customer from a friend, but that nevertheless he would like to have her for a customer and that she could contact him through Decker (R. 62–63).

On April 3, 1941, at Lucille's request, Dorothy stayed in Edge's room at the hotel to tell "customers that might come in" to wait for Lucille, who had gone out to look for her "connection," Mose. Lou Cheatam and her son, and Maisie Hudson, and Bubbles Haines came in and waited for Lucille, who returned in about an hour with an ounce of drugs (R. 63, 64). Lucille sold a $16 deck to Lou Cheatam and her son and a $3 deck to Bubbles and some to Maisie Hudson. Lucille then said "she certainly appreciated it, because she would have lost thirty dollars' worth of business if [Dorothy] had not stayed there for her" (R. 65).

On April 8, 1941, when Driscoll, who was to bring some drugs, did not show up by midnight, Lucille took Dorothy out to the Squires or Squares tavern and there, in the early morning of April 9, found another "connection" of hers, Wing or

Wingey (James Tillman). Lucille bought a $6 deck and Dorothy a $3.50 deck from Wingey (R. 65–66). The girls returned to the Prairie Hotel, where they found Edge, who had obtained some drugs, and Dorothy bought an $8 deck (R. 67–68).

The substance purchased by Dorothy on March 8 was found to be a mixture of morphine and codein sulphate, derivatives of opium; all the other purchases were found to be heroin hydrochloride, also a derivative of opium (R. 137).

During the period covered by count 32, there were also numerous other sales. Mose sold heroin to Eddie (R. 105), to Earl Nettles (R. 109–110), to Wingey (R. 111), and to Glen Howard (R. 122). Wingey sold heroin to Earl Nettles (R. 109–110). Austin Edge and Lucille Williams sold heroin to Ruford Kelley (R. 114).

ARGUMENT

1. Petitioner contends (Pet. 11, 15–18) that the trial court erred in admitting evidence as to the transactions in which he did not actually participate because such evidence proved a number of different and disconnected minor conspiracies and not the general conspiracy charged in the indictment.

The evidence set forth above (pp. 4–5), showing that petitioner himself sold narcotics to Dorothy Sullivan on March 11, 1941, was plainly sufficient to sustain his conviction on count 17,

the substantive count.[4] Since the general sentence imposed did not exceed that which might have been imposed on that count alone,[5] the validity of the sentence under the conspiracy count is immaterial. *Evans* v. *United States,* 153 U. S. 584, 595; *Abrams* v. *United States,* 250 U. S. 616, 619; *Claasen* v. *United States,* 142 U. S. 140, 146–147; *Pierce* v. *United States,* 252 U. S. 239, 252–253.

Moreover, that the evidence complained of was admissible under count 32 of the indictment is clear. In that count each of the various transactions was alleged (R. 30–33) as a separate overt act in furtherance of a single comprehensive scheme to violate the narcotic laws. Consequently, there can be no question but that the evidence of these transactions was properly admitted to prove the allegations of the indictment. And that the proof adequately established a single over-all conspiracy in which petitioner participated is equally clear.

Menendaz and Vic Shaw were the initial conspirators who connived in arranging that Doro-

[4] Petitioner's contention (Pet. 18–19) that the testimony of the principal Government witness is incredible because she was an informer and a former narcotic addict, with a prison record, presents no question for review by this Court. The testimony was relevant and competent, and the weight to be accorded it was for the jury.

[5] 21 U. S. C. 174 (*supra*, pp. 2–3) provides for a fine of not more than $5,000 and imprisonment for not more than 10 years.

thy Sullivan be supplied with narcotics, and petitioner was the first to assist them in furthering their unlawful purpose, "knowing in a general way their purpose to break the law." *Luteran* v. *United States*, 93 F. (2d) 395, 399 (C. C. A. 8), certiorari denied, 303 U. S. 644. By thus embarking upon the criminal venture he became responsible for all which had been done or which might be done by his fellow conspirators in furtherance of the conspiracy. *McDonald* v. *United States*, 89 F. (2d) 128, 133 (C. C. A. 8), certiorari denied, 301 U. S. 697; *Allen* v. *United States*, 4 F. (2d) 688, 692 (C. C. A. 7), certiorari denied, 267 U. S. 597, 598, and 268 U. S. 689; *Rudner* v. *United States*, 281 Fed. 516, 519–520 (C. C. A. 6), certiorari denied, 260 U. S. 734. In furtherance of the same general conspiracy, Vic later referred Dorothy to Austin Edge and Lucille Williams, who in turn acquainted her with Mose, Driscoll, and Wingey. Similarly, Menendaz introduced her to Decker, who in turn referred her to Booker, who already knew of Dorothy as one of Edge's "good customers." Petitioner cannot escape responsibility for the acts of these defendants merely because what he may have conceived to be a limited conspiracy "turned out to be one of wider range of which the supposed smaller one, in fact, was but a segment," for it is enough that he had "connected himself with a criminal conspiracy, even though he was unaware of its full ex-

tent." *United States* v. *Manton*, 107 F. (2d) 834, 848, 849 (C. C. A. 2), certiorari denied, 309 U. S. 664; see also *Coates* v. *United States*, 59 F. (2d) 173, 174 (C. C. A. 9).

2. The trial court instructed the jury that (R. 189)—

> The defendant Sol Feinberg has put in evidence his general reputation for being a peaceful, law-abiding citizen. Such evidence is permissible under the law, and is to be considered by the jury as a circumstance in this case along with all other facts and circumstances in evidence.

Petitioner contends (Pet. 3–4, 13–15) that the foregoing instruction was inadequate under the decision of this Court in *Edgington* v. *United States*, 164 U. S. 361, as interpreted in *Sunderland* v. *United States*, 19 F. (2d) 202, 214–215 (C. C. A. 8), and *Salinger* v. *United States*, 23 F. (2d) 48, 52–53 (C. C. A. 8). He asserts that the instruction was too narrow and did not explain to the jury the purpose and function of character evidence.[6]

It is first to be noted that petitioner did not object to the charge as given, nor did he request that it be amplified. Cf. the *Edgington*, *Sunderland*, and *Salinger* cases. Therefore, his contention,

[6] Petitioner also claims (Pet. 15) that the instruction was bad because it ignored the testimony as to petitioner's reputation for truth and veracity. There is no requirement, however, that the trial court recapitulate all the items of evidence. *Allis* v. *United States*, 155 U. S. 117, 124.

raised for the first time on appeal, presents nothing for review, for, as was held in *Allen* v. *United States,* 4 F. (2d) 688, 694, *supra,* certiorari denied 301 U. S. 697:

> Errors in the instructions should be pointed out specifically before the jury retires, and the court should be given an opportunity of correcting its mistake or oversight. This rule is dictated by public policy, and prevents new trials and unnecessary expense.

Allis v. *United States,* 155 U. S. 117, 124; cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 238–239.

Apart from petitioner's failure to object, we think that the instruction given was adequate. In the *Edgington* case, this Court condemned as erroneous an instruction to the effect that "evidence of good character could only be considered if the rest of the evidence created a doubt of defendant's guilt." The Court said, in effect, that the purpose and function of character evidence is to generate a reasonable doubt; that it is entitled to be considered, whether the other evidence be clear or doubtful; that when it is considered with the other evidence, if a reasonable doubt is created as to defendant's guilt, he is entitled to an acquittal; and that the circumstances may be such that it alone may create a reasonable doubt, although without it the other evidence would be convincing. However, by this discussion

the Court "was simply giving its opinion as to what effect evidence of good character might have, and not laying down the rule as to the charge to be given by the trial court." *Grace* v. *United States,* 4 F. (2d) 658, 662 (C. C. A. 5), certiorari denied 268 U. S. 702. See also *Nash* v. *United States,* 54 F. (2d) 1006, 1007 (C. C. A. 2); *Winter* v. *United States,* 13 F. (2d) 53, 59 (C. C. A. 8); *Allen* v. *United States, supra,* at p. 695; and *Le More* v. *United States,* 253 Fed. 887, 894 (C. C. A. 5), certiorari denied 248 U. S. 586.

The instruction given avoided the error condemned in the *Edgington* case, and conformed in substance to those approved in *Winter* v. *United States, supra,* at p. 58; *Linde* v. *United States,* 13 F. (2d) 59, 61–62 (C. C. A. 8); *Warren* v. *United States,* 250 Fed. 89, 92–93 (C. C. A. 9); *Searway* v. *United States,* 184 Fed. 716, 717 (C. C. A. 8); and *Humes* v. *United States,* 182 Fed. 485, 488–489 (C. C. A. 8).

The *Sunderland* and *Salinger* cases, which express the view that the discussion in the *Edgington* case undertakes to lay down a rule of law, misconstrue the purport of this Court's opinion. But, in any event, whatever basis there may be for requiring a more comprehensive instruction in mail fraud cases where the subjective issue of intent is critical, the charge given in the present case was entirely adequate since the only purpose of petitioner's reputation evidence

was to bolster the credibility of his flat denial that he was engaged in the narcotic traffic. As was stated in *Allen* v. *United States, supra,* at 695, character testimony "grows to large importance in one case, while in another it is inconsequential."

CONCLUSION

The decision below is correct, and there is no real conflict of decisions nor any question of general importance. We, therefore, respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
OSCAR A. PROVOST,
ANDREW F. OEHMANN,
Attorneys.

JANUARY 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942